

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GEORGE DAVID DIMOVSKI,

Defendant-Appellant.

UNPUBLISHED

December 18, 2003

No. 242726

Wayne Circuit Court

LC No. 01-010842-01

Before: Schuette, P.J., and Murphy and Bandstra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of fourth-degree fleeing and eluding, MCL 257.602a(2), and driving while license suspended, MCL 257.904. The trial court sentenced defendant to a term of 16 to 24 months' imprisonment for the fleeing and eluding conviction, and 6 months to 1 year for his conviction of driving while license suspended. Defendant appeals as of right, seeking resentencing on the basis of errors in the scoring of his sentencing guidelines. We agree that defendant's sentencing guidelines were incorrectly scored and, therefore, remand for resentencing.

Defendant first argues that the trial court erred in scoring prior record variable five (PRV 5) at twenty points. The prosecutor concedes that this variable was incorrectly scored, and we agree.

MCL 777.55(1)(a) requires that PRV 5 be scored at twenty points if "[t]he offender has 7 or more prior misdemeanor convictions or prior misdemeanor juvenile adjudications." In increasing the score under PRV 5 from its original point total of five, the trial court reasoned that although defendant's two prior misdemeanor juvenile adjudications had been properly considered in scoring that variable,¹ a number of "traffic misdemeanors" had not been so considered. Counsel for defendant objected to the trial court's consideration of these traffic-related misdemeanors, which included such offenses as driving while license suspended and failure to display a valid operator's license, on the ground that for purposes of scoring PRV 5 a prior misdemeanor conviction is to be counted "only if it is an offense against a person or

¹ MCL 777.55(1)(d) requires that PRV 5 be scored at five points where "[t]he offender has 2 prior misdemeanor convictions or prior misdemeanor juvenile adjudications."

property, a controlled substance offense, or a weapon offense.” See MCL 777.55(2)(a). Accordingly, counsel argued that the traffic-related misdemeanors cited by the trial court, none of which could be considered offenses against a person or property, could not be properly considered in scoring PRV 5. The trial court, however, rejected this argument and imposed a sentence of 16 to 24 months based on the guidelines sentencing range of 5 to 23 months arrived at by scoring PRV 5 at twenty points. In imposing this sentence the trial court noted that, even if defense counsel was correct that PRV 5 had been incorrectly scored, defendant’s sentencing guidelines range with a PRV 5 score of five points would be 2 to 17 months and, therefore, the sixteen-month minimum sentence imposed would still be within the guidelines range. We find the trial court’s conclusion in this regard, as well as its consideration of the traffic-related misdemeanors when scoring PRV 5, to be error require resentencing.

This Court reviews de novo the application of the sentencing guidelines. *People v Hegwood*, 465 Mich 432, 436; 636 NW2d 127 (2001). In determining that consideration of defendant’s traffic-related misdemeanors was appropriate, the trial court appears to have relied on the fact that each of the subject offenses were punishable by a ninety-day jail term and/or a \$500 fine. However, although the possibility of such discretionary punishment is consistent with the definition of a misdemeanor as provided for in the Michigan Penal Code, see MCL 750.8, the statutes expressly applicable to scoring PRV 5 limit consideration of prior misdemeanor convictions to those offenses that are “an offense against a person or property, a controlled substance offense, or a weapon offense.” MCL 777.55(2)(a). As argued by defense counsel below, none of the traffic-related misdemeanors cited by the trial court as grounds for increasing defendant’s score under PRV 5 fall within this category. Accordingly, the trial court erred in scoring PRV 5 at twenty points.

The trial court further erred in determining that this scoring error was irrelevant because the sixteen-month minimum sentenced imposed remained within the 2 to 17 month sentencing guidelines range applicable with a PRV 5 score of only five points. In reaching this conclusion, the trial court failed to recognize that, under the statutory sentencing guidelines, if the upper limit of the recommended minimum sentence range is eighteen months or less, the trial court must impose an intermediate sanction unless it states on the record that a substantial and compelling reason exists to commit the defendant to the jurisdiction of the Department of Corrections. MCL 769.34(4)(a). Under MCL 769.34(4)(a), an intermediate sanction may include a jail term that does not exceed the upper limit of the guidelines range or twelve months, whichever is less, but may not include a prison term. See *People v Stauffer*, 465 Mich 633, 635; 640 NW2d 869 (2002); see also MCL 769.31(b). Accordingly, the upper limit of the applicable guidelines sentencing range of 2 to 17 months being greater than twelve months, the trial court was empowered to impose upon defendant, absent a statement of substantial and compelling reasons, a sentence of no more than twelve months in jail. Consequently, this matter must be remanded for resentencing. On remand the trial court must either state substantial and compelling reasons for imposing a prison sentence or order that defendant, having already served a term greater than that permitted absent such reasons,² be immediately released.³

² At the time this matter was submitted, defendant had already served nearly twenty-three months of his twenty-four-month maximum sentence.

We reject, however, defendant's claim that he is entitled on remand to be resentenced before a different trial judge. Reassignment is generally necessary only if the trial judge exhibited "any prejudices or improper attitudes regarding [the] particular defendant." *Hegwood, supra* at 440-441 n 17. More specifically, "[a] case should be assigned to a different judge if it would be unreasonable to expect the trial judge, given [his] handling of the matter, to be able to put previously expressed findings out of mind without substantial difficulty." *People v Pillar*, 233 Mich App 267, 270-271; 590 NW2d 622 (1998). Here, defendant has failed to demonstrate that the trial judge had a prejudice or improper attitude, as opposed to an incomplete understanding of the correct application of the still relatively new statutory sentencing guidelines. See *Hegwood, supra*. Contrary to defendant's assertion, the mere fact that the trial court sentenced defendant to the maximum sentence believed by the court to be possible is insufficient to show the prejudice necessary for reassignment of this matter. Accordingly, there exists no reason to assign a different judge to conduct the resentencing. *Id.*

We remand for resentencing. We do not retain jurisdiction.

/s/ Bill Schuette

/s/ William B. Murphy

/s/ Richard A. Bandstra

(...continued)

³ Although defendant also argues that the trial court erred in the scoring of offense variables 3, 13, and 19, we need not consider those arguments. As noted above, defendant has already served nearly twenty-three months of his twenty-four-month maximum sentence. Thus, even were we to conclude that each of these variables were incorrectly scored, defendant has already served the minimum sentence of nine months in jail that would then be applicable. The issue whether these offense variable were correctly scored is, therefore, moot. See *People v Rutherford*, 208 Mich App 198, 204; 526 NW2d 620 (1994) ("Where a subsequent event renders it impossible for this Court to fashion a remedy, an issue becomes moot").